

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7394

In The
United States Court of Appeals

For the Second Circuit

JOSEPH A. SAN FILIPPO, as President of Local #72, United
Brotherhood of Carpenters and Joiners of America, and
ROBERT S. MURPHY, as Secretary of Local #72, United
Brotherhood of Carpenters and Joiners of America, and
LOCAL #72, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA,

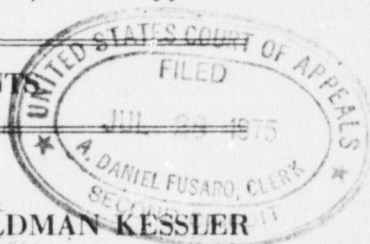
Plaintiffs-Appellants,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA,

Defendant-Appellee.

BRIEF OF APPELLANTS



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STATUTES AND RULES INVOLVED

Rule 65, Federal Rules of Civil Procedure

Rule 65. Injunctions.

(a) Preliminary Injunction.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing With Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a) (2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

* * * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

* * *

Rule 52(a), Federal Rules of Civil Procedure**Rule 52. Findings by the Court.**

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

**§301(a), Labor Management Relations Act
of 1947 (29 U.S.C. §185(a))****§185. Suits by and against labor organizations**

(a) Venue, amount and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

**§302, Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §462)**

462. Purposes for which a trusteeship may be established. — Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

**§303(a), Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §463(a))**

463. Unlawful acts relating to labor organization under trusteeship. — (a) During any period when a subordinate body of a labor organization is in trusteeship, it shall be unlawful (1) to count the vote of delegates from such body in any convention or election of officers of the labor organization unless the delegates have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate, or (2) to transfer to such organization any current receipts or other funds of the subordinate body except the normal per capita tax and assessments payable by subordinate bodies not in trusteeship: Provided, That nothing herein contained shall prevent the distribution of the assets of a labor organization in accordance with its constitution and bylaws upon the bona fide dissolution thereof.

**§3(h), Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §402(h))**

(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor

organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

**§304(c), Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §464(c))**

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302 [§ 462 of this title]. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302 [§ 462 of this title.] In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

**§501(a), Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §501(a))**

501. Fiduciary responsibility of officers of labor organizations. — (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the

benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

**§101(a)(1), Labor Management Reporting & Disclosure
Act of 1959 (29 U.S.C. §411(a)(1))**

411. Bill of rights. — (a)(1) Equal rights. — Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

**§101(a)(5), Labor Management Reporting & Disclosure
Act of 1959 (29 U.S.C. §411(a)(5))**

(5) Safeguards against improper disciplinary action. — No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B)

given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

**§609, Labor Management Reporting & Disclosure Act
of 1959 (29 U.S.C. §529)**

529. Prohibition on certain discipline by labor organization. — It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 [§412 of this title] shall be applicable in the enforcement of this section.

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JOSEPH A. SAN FILIPPO, as President of Local #72, United
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ROBERT S. MURPHY, as Secretary of Local #72, United
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UNITED BROTHERHOOD OF CARPENTERS AND
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Defendant-Appellee.

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from so much of the order of the United States District Court, Western District of New York, dated June 18, 1975, (Burke, U.S.D.J.) as denied plaintiffs' motion for a preliminary injunction. The decision [Appendix, pp. A118-119] is not reported.

ISSUE PRESENTED

Did the District Court commit error in denying plaintiffs' motion for a preliminary injunction, without stating findings of fact and conclusions of law, where the Court found plaintiffs'

claims to be meritorious and a preliminary injunction is necessary to the continued existence of plaintiffs?

STATEMENT OF CASE

Nature of Case

This is an action by Local #72, United Brotherhood of Carpenters and Joiners of America ("Local #72"), and by its President, Joseph A. San Filippo ("San Filippo"), and its Recording Secretary, Robert S. Murphy ("Murphy"), against the United Brotherhood of Carpenters and Joiners of America ("United Brotherhood"). By this action, plaintiffs challenge the legality of the directive of the United Brotherhood, dated April 10, 1975, (the "directive", Appendix, pp. A14-16) which directs, among other things, the revocation of Local #72's charter (by the consolidation of Local #72 with four other local carpenters' unions) and the supervision of Local #72 by a representative of the United Brotherhood. Plaintiffs demand judgment ordering that directive annulled, together with necessary and incidental injunctive relief.

Proceedings in The District Court

This action was commenced in the United States District Court, Western District of New York, by the filing of a summons and verified complaint on April 30, 1975.

By order to show cause issued April 30, 1975, the District Court issued a temporary restraining order [Appendix pp. A23-23] granting on plaintiffs' motion for a preliminary injunction and restraining the United Brotherhood from effectuating the terms of the directive of the United Brotherhood, dated April 10, 1975, which is the subject of this action. In issuing that temporary restraining order, the District Court found that failure to restrain the United Brotherhood from effectuating the subject directive would result in immediate and irreparable injury, loss and damage to plaintiffs. The temporary restraining

order, together with the supporting papers upon which it was based, was served upon the United Brotherhood on May 1, 1975. An amended verified complaint [Appendix pp. A81-98] was served on May 9, 1975.

Plaintiffs' motion for a preliminary injunction was argued in the District Court on May 12, 1975, at which time the United Brotherhood cross-moved [Appendix pp. A100-102] to dissolve the temporary restraining order and to dismiss the complaint for failure to state a cause of action. No hearing was had on plaintiffs' motion for a preliminary injunction.

By order dated June 18, 1975, [Appendix, pp. A118-119] the District Court denied plaintiffs' motion for a preliminary injunction and denied defendant's motion to dismiss. To date, defendant has not interposed its answer.

By order to show cause issued June 20, 1975, the District Court issued a temporary injunction pending appeal [Appendix, pp. A121-123] bringing on plaintiffs' motion for an injunction pending appeal and enjoining the United Brotherhood from effectuating the terms of the challenged directive, pending the hearing and determination of plaintiffs' motion in the District Court for an injunction pending appeal.

On the return date of plaintiffs' motion for an injunction pending appeal, July 14, 1975, the District Court (Burke, U.S.D.J.) indicated that, in his view, plaintiffs' application for an injunction pending appeal should be considered by this Court. Therefore, Judge Burke, by oral order, denied plaintiffs' motion for an injunction pending appeal, continued the temporary injunction pending appeal until plaintiffs' application for an injunction pending appeal could be considered by this Court, and directed plaintiffs-appellants to promptly seek such relief in this Court.

Prior Proceedings in This Court

By order to show cause issued July 15, 1975, this Court issued a temporary injunction pending appeal, bringing on plaintiffs' motion in this Court for an injunction pending appeal and enjoining the United Brotherhood from effectuating the terms of the challenged directive, pending the hearing and determination of plaintiffs' motion in this Court for an injunction pending appeal.

On July 18, 1975, this Court granted plaintiffs' motion for an injunction pending appeal and directed that this appeal be expedited.

Facts

The facts underlying and surrounding this action are set forth in detail in the affidavit of Joseph A. San Filippo, sworn to April 30, 1975, [Appendix, pp. A42-59], in the affidavit of August Virginia, sworn to May 9, 1975 [Appendix, pp. A113-117], in the supplemental affidavit of Joseph A. San Filippo, sworn to May 9, 1975 [Appendix, pp. A109-112], all submitted in the District Court in support of plaintiffs' motion for a preliminary injunction, and in the amended verified complaint [Appendix, pp. A81-98], and will not be repeated at length here.

For the convenience of the Court, the following essential facts are reiterated: Local #72 is presently one of five local carpenters' unions and four local industrial unions comprising the Carpenters' District Council of Rochester, New York and Vicinity ("District Council"). [San Filippo Affidavit, Appendix, p. A 43]. On April 10, 1975, without any hearings having been conducted and without any reports or written findings having been made known to Local #72 [San Filippo, Affidavit, Appendix, p. A 45], the United Brotherhood issued a directive ordering, among other things, that the following steps be taken, effective May 1, 1975:

- (a) Carpenters' Local Unions #72, #240, #502, #662, and #1508 are ordered dissolved and consolidated into one new local carpenters' union;
- (b) Industrial Local Unions #2407, #231, #687, and #225 are ordered dissolved and consolidated into one new local industrial union;
- (c) A "pro tem" Executive Committee is established, effective immediately, and General Representative William Lawyer, of the United Brotherhood is assigned "to guide the newly formulated Local Unions and officers for a reasonable period to insure that the policies and objectives of the United Brotherhood and newly formed Local Unions are implemented";
- (d) The Business Manager and the business representatives of the District Council are assigned as business representatives of the new carpenters' local union, and are placed under the direction of General Representative Lawyer. [San Filippo Affidavit, Appendix, pp. A52-54].

Local #72 promptly took intra-union appeals from the directive to the General Executive Board of the United Brotherhood [Appendix, pp. A55-59]. The United Brotherhood has not, to the date hereof, acted upon these appeals. Rather, the United Brotherhood has taken the position that it is enjoined from acting upon the intra-union appeals [Lawyer Affidavit, Appendix, p. A108].

SUMMARY OF ARGUMENT

The order of the District Court denying plaintiffs' motion for a preliminary injunction is erroneous both substantively and procedurally. Plaintiffs are entitled to a preliminary injunction as a matter of law. Moreover, the subject order is fatally defective in its failure to set forth adequate findings of fact and conclusions of law.

ARGUMENT

POINT I

Plaintiffs are entitled to a preliminary injunction as a matter of law.

The standard to be applied in determining if, pursuant to Rule 65, Federal Rules of Civil Procedure, a preliminary injunction should issue is, appellants submit, well settled and free of doubt:

"The purpose of a preliminary injunction is to maintain the status quo pending a final determination of the merits, [citations]. It is an extraordinary remedy, and will not be granted except upon a clear showing of probable success and possible irreparable injury. [citations]. However, "the burden of [showing probable success] is less where the balance of hardships tips decidedly toward the party requesting the temporary relief." [citation]. In such a case, the moving party may obtain a preliminary injunction if he has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation. [citations]." *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323(2nd Cir. 1969), cert. denied 394 U.S. 999(1969).

In Accord:

Ohio Oil Co. v. Conway, 279 U.S. 813, 815 (1929);
Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2nd Cir. 1953);
Colorado Labor Council v. AFL-CIO, 349 F.Supp. 37 (D.Colo. 1972);
Selchow & Richter Co. v. Western Printing, 112 F.2d 430, 431 (7th Cir. 1940).

From the proper application of this rule to the case at bar, the conclusion necessarily follows that plaintiffs are entitled to a preliminary injunction because: (1) plaintiffs have asserted

substantial claims that the District Court found to be meritorious, (2) the record in the District Court establishes that plaintiffs will suffer immediate and irreparable injury and damage in the absence of a preliminary injunction, and (3) the record in the District Court establishes that issuance of a preliminary injunction will occasion no measurable harm to the United Brotherhood.

A. Plaintiffs have asserted substantial and meritorious claims upon which they are likely to prevail on the merits.

In the amended verified complaint [Appendix, pp. A81-98], plaintiffs assert six substantial and meritorious causes of action. Indeed, these causes of action were found by the District Court to be of sufficient merit to withstand defendant's motion to dismiss [Appendix, p. A 119].

For the following reasons, plaintiffs are likely to prevail on the merits of each cause of action.

1. Plaintiffs' first cause of action is meritorious.

Plaintiffs' first cause of action is set forth in paragraphs 18, 19 and 20 of the amended verified complaint:

"18. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

19. The Constitution and Laws of the Union Brotherhood constitutes a contract between the United Brotherhood and its affiliated Local Unions.

20. The directive of the General President of the United Brotherhood dated April 10, 1975, purportedly made pursuant to Section 6-A of the Constitution and Laws of the United Brotherhood, a copy of which is attached hereto as Exhibit D, is violative of that contract in that the effective date of the directive is prior to the

determination of the appeal from the directive, and in that the vested rights of the members of Local Union #72 are not preserved by said directive as provided for by Section 6-A of said Constitution and Laws."

It is well established that the Constitution and Laws of the United Brotherhood constitutes a contract between the United Brotherhood and Local #72, the breach of which gives rise to a valid cause of action within the jurisdiction of the District Court. *Parks v. International Brotherhood of Electrical Workers*, 314 F.2d 886, 914 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1963); Section 301 Labor Management Relations Act of 1947 (29 U.S.C. §185 (a)).

The subject United Brotherhood directive was issued under the alleged authority of Section 6-A of the Constitution and Laws of the United Brotherhood. However, the face of Section 6-A itself [Appendix, p. A 96] reveals that the directive is contrary to the terms of the Constitution and Laws in that: (1) the directive fails to permit a meaningful "appeal to the General Executive Board", and the directive fails to preserve the "vested rights of the members" as expressly required by Section 6-A.

Local #72's right of appeal has been rendered moot by the fact that the effective date set forth in the directive did not permit a meaningful appeal, and the United Brotherhood's position that the injunctive relief granted to plaintiffs to date renders the United Brotherhood powerless to process and decide the intra-union appeal [Lawyer Affidavit, Appendix, p. A 108]. The "vested rights of the members" of Local #72 would be lost if the directive is effectuated in that their voting rights in both the "pro tem Executive Committee" established by the directive and in the United Brotherhood General Convention would be severely diluted [San Filippo Affidavit, Appendix, p. A46-47; San Filippo Supplemental Affidavit, Appendix, p. A109-110].

Plaintiffs' first cause of action is meritorious.

2. Plaintiffs' second cause of action is meritorious.

Plaintiffs' second cause of action is set forth in paragraphs 21, 22 and 23 of the amended verified complaint:

"21. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

22. The directive dated April 10, 1975, constitutes the imposition by the United Brotherhood of a trusteeship over Local Union #72.

23. The imposition of the trusteeship over Local Union #72 is contrary to Sections 6-D and 10-H of the Constitution and Laws of the United Brotherhood, copies of which are attached hereto as Exhibits E and F, and is contrary to law in that: (a) it was imposed for a reason or reasons other than the reasons set forth in Sections 6-D and 10-H of the Constitution and Laws of the United Brotherhood and in Section 302 of the Labor-Management Reporting and Disclosure Act of 1959; (b) the trusteeship was imposed without a fair hearing; (c) the imposition of the trusteeship results in the transfer of assets of Local Union #72 to the United Brotherhood, contrary to Section 303 of the Labor-Management Reporting and Disclosure Act of 1959; (d) the imposition of the trusteeship is otherwise contrary to law."

"Trusteeship" is defined in Section 3(h) of the Labor Management Reporting and Disclosure Act of 1959 ["LMRDA", 29 U.S.C. §402(h)] as follows:

"(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws." [emphasis added]

Because the directive of the United Brotherhood has the effect of dissolving Local #72 and placing the proposed new consolidated local union under the direct supervision of a

General Representative of the United Brotherhood, the conclusion that a trusteeship has been imposed over Local #72 is inescapable. [San Filippo Affidavit, Appendix, pp. A49-51]. *Navarro v. Gannon*, 385 F.2d 512 (2nd Cir. 1967); *Parks v. International Brotherhood of Electrical Workers*, *supra*.

Indeed, the United Brotherhood is already exercising substantial control and supervision over Local #72 by controlling its finances and attending its membership meetings. [San Filippo Supplemental Affidavit, Appendix pp. A111-112] and by calling and controlling meetings of the District Council. [San Filippo Affidavit, Appendix pp. A43-44].

Here, as in *Local No. 2 v. International Brotherhood of Telephone Workers*, 261 F.Supp. 433, 434 (D. Mass.1966):

"The crux of plaintiffs claim for equitable relief is its contention that, in legal effect, what the international did in 'suspending' the charter of [the local] and in installing [Lawyer] to take over and conduct all business of the Local was impose a trusteeship over the Local in such a way as to violate mandatory requirements of 29 U.S.C. §462 and 29 U.S.C. §464(c)."

Here, as in *Local No. 2*, the legal effect of the United Brotherhood's action is the imposition of a trusteeship over Local #72.

Section 302, LMRDA (29 U.S.C. §462) provides that a trusteeship may be established and administered only on the terms set forth in the supervising labor organization's constitution and bylaws and, even then, only if the imposition of the trusteeship is justified for one of the specific purposes enumerated therein.

Although the topic of trusteeship is treated in Sections 6-D and 10-H of the United Brotherhood Constitution and Laws [Appendix, pp. A97-98], the subject trusteeship is fatally defective in that it is contrary to the United Brotherhood

Constitution and Laws and in that the reason stated by the United Brotherhood for taking the actions directed by the directive of April 10, 1975 is clearly not a valid purpose for imposing a trusteeship over Local #72.

Specifically, the trusteeship imposed by the United Brotherhood is contrary to its own Constitution and Laws in that no notice was given to Local #72 of the contemplated trusteeship, no hearings were held, and no appeal to the General Convention is provided for in the directive, all of which are prerequisites of a valid trusteeship under Section 10-H.

Moreover, Section 303(a), LMRDA (29 U.S.C. 463(a)) forbids transfer of funds from Local #72 to the United Brotherhood, an act that will apparently occur if the directive is effectuated.

Lastly, even beyond the express terms of the United Brotherhood Constitution and Laws, a fair hearing is made a prerequisite to a valid trusteeship by both Section 304(c), LMRDA (29 U.S.C. 464(c)) and the case law. *Smith v. Distillery Workers* (N.O.R.) 75 LRRM 2049 (E.D.Ky. 1970); *Local No. 2 v. International Brotherhood of Telephone Workers, supra*.

In sum, because no notice was given to Local #72, because no hearings were held, and because the trusteeship was imposed without a right of appeal, the trusteeship imposed by the United Brotherhood over Local #72 is defective as a matter of law.

Plaintiffs' second cause of action is meritorious.

3. *Plaintiffs' third cause of action is meritorious.*

Plaintiffs' third cause of action is set forth in paragraphs 24 and 25 of the amended verified complaint:

"24. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

25. The directive dated April 10, 1975 is contrary to Section 501 (a) of the Labor-Management Reporting and Disclosure Act of 1959 in that it compels the use of the funds and property of Local Union #72 for purposes other than for the benefit of members of Local Union #72."

Although the United Brotherhood has not specified the disposition that would be made of the funds of Local #72 if its directive dated April 10, 1975 is effectuated, and has not clarified the status of outstanding obligations and commitments of Local #72, it appears that Local #72's funds would become the funds of the proposed new carpenters local union [San Filippo Affidavit, Appendix, pp. A48-49; Virginia Affidavit, Appendix, pp. A114-116].

Section 501(a), LMRDA (29 U.S.C. §501(a)) mandates that the funds of Local #72 be used only for the benefit of the members of Local #72. The United Brotherhood directive dated April 10, 1975, would, therefore, result in a use of the funds of Local #72 in a manner expressly violative of Section 501(a).

Plaintiffs' third cause of action is meritorious.

4. Plaintiffs' fourth cause of action is meritorious.

Plaintiffs' fourth cause of action is set forth in paragraphs 26 and 27 of the amended verified complaint.

"26. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

27. The directive dated April 10, 1975, is contrary to Section 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959 in that it was directed without the opportunity for the members of the Local Unions to vote thereon."

Section 101(a)(1), LMRDA (29 U.S.C. §411(a)(1)), the first section of the Bill of Rights established by the LMRDA, provides as follows:

"Sec. 101(a)(1) Equal Rights — Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

The directive of the United Brotherhood dated April 10, 1975 stands in direct violation of Section 101(a)(1) in at least three ways:

- (1) The members of Local #72 were not permitted to vote upon the substantial changes therein directed [San Filippo Affidavit, Appendix, pp. A46-47];
- (2) The voice of the members of Local #72 in the General Convention of the United Brotherhood would be substantially diminished by the implementation of the directive in that the total number of delegates to the General Convention from the five local carpenters' unions to be consolidated would be reduced from 10 to 4 [San Filippo Supplemental Affidavit, Appendix, pp. A109-110]; and
- (3) The presence of a United Brotherhood representative at the meetings of Local #72 has impaired the membership rights of the members of Local #72 [San Filippo Supplemental Affidavit, Appendix, pp. A111-112].

SEE: *Navarro v. Gannon, supra*.

"We hold that the LMRDA secures the right of union members to meet without interference from the international union except where the parent organization acts in accordance with lawfully established procedures to institute a trusteeship over the local union." 385 F.2d at 514.

* * *

"... we know from political experience that once suppressed, the democratic spirit may not soon be revived in Local [# 1]' 385 F.2d at 520.

Plaintiffs' fourth cause of action is meritorious.

5. Plaintiffs' Fifth Cause of Action is Meritorious.

Plaintiffs' fifth cause of action is set forth in paragraphs 28 and 29 of the amended verified complaint:

"28. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

29. The directive dated April 10, 1975 is contrary to Section 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act of 1959 in that it directs the improper discipline of plaintiffs without due process of law."

Sections 101(a)(5) & 609, LMRDA (29 U.S.C. §§ 411(a)(5) & 529), expressly forbid discipline of union members (other than for non-payment of dues) without notice and a fair hearing.

The dissolution of a local union, with resulting damage to its members, is plainly discipline of the members thereof, and is, therefore, subject to due process requirements. *Local 853 v. United Brotherhood of Carpenters and Joiners of America* (N.O.R.) 83LRRM 2759 (D.N.J.1972); *Parks v. International Brotherhood of Electrical Workers, supra*.

The substantial scope of the injury and damage that would result to the plaintiffs, as members of Local #72, from the implementation of the directive dated April 10, 1975 is shown in detail by the affidavits submitted in the District Court, with perhaps the most striking examples being that the voting and financial rights of Local #72 members would be severely dissipated in both the proposed new carpenters' local union [San Filippo Affidavit, Appendix, pp. A46-49; Virginia Affidavit, Appendix, pp. A115-116] and in the United Brotherhood

General Convention [San Filippo Supplemental Affidavit, Appendix, pp. A109-110]. SEE: *Pittman v. United Brotherhood of Carpenters and Joiners of America*, 251 F.Supp. 323 (M.D.Fla. 1966):

"It is not necessary to decide whether every relocation of a local's charter constitutes 'discipline'. Plaintiffs established that the revocation in this case resulted in their losing certain basic membership rights because they then would be forced into another local."

Plaintiffs' fifth cause of action is meritorious.

6. Plaintiffs' Sixth Cause of Action is Meritorious.

Plaintiffs' sixth cause of action is set forth in paragraphs 30 and 31 of the amended verified complaint:

"30. Plaintiffs repeat and reallege each and every allegation contained in paragraphs '1' through '17' hereof.

31. The directive dated April 10, 1975 is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States of America in that it deprives Local Union #72, and its members, of its and their property without due process of law."

In view of what has been established above on behalf of plaintiffs, it needs only to be repeated here that substantial property and other rights of the plaintiffs, as members of Local #72, will be lost unless the United Brotherhood directive is annulled. Moreover, because of the circumstances by which the directive was pronounced, that loss of rights would occur without due process of law and is, therefore, violative of the Constitution of the United States of America.

Plaintiffs' sixth cause of action is meritorious.

The recent decision of this Court in *Head v. Brotherhood of Railway, Airline and Steamship Clerks* (March 7, 1975, Civ. 74-307), heavily relied upon by defendant in the District

Court, adds nothing to defendant's assertion that plaintiffs' claims are without merit, for the following reasons:

Contrary to the facts of the case at bar, the plaintiff in *Head* asserted only one claim for relief, and grounded that claim exclusively upon Section 501 of the LMRDA (29 U.S.C. §501). Therefore, this Court's decision in *Head* is necessarily addressed only to the narrow issue of whether the complaint stated a claim upon which relief could be granted under Section 501.

Likewise, both cases cited by this Court in *Head*, *Gurton v. Arons*, 339 F.2d 371 (2nd Cir. 1964) and *Coleman v. Brotherhood of Railway and Steamship Clerks*, 340 F.2d 206 (2nd Cir. 1965) were grounded primarily upon Section 501.

The *Gurton* case involved the resolution passed by a local union requiring voting in person. The parent national union, apparently following the procedures set forth in its bylaws, voided the resolution as an improper disenfranchise of a large number of the local's members. The proponents of the resolution challenged, in two consolidated actions, the national's act of voiding the resolution. One action was based upon Section 501, and the related action was based upon Section 101(a)(1). This Court found the claim under Section 101(a)(1) to be without merit inasmuch as there were no allegations, as there are in the instant case, that the national's constitution was being applied in such a way as to deny equality in voting. Likewise, this Court affirmed the decision of the Southern District of New York holding that, under the facts alleged, no valid claim for relief was stated under Section 501 because no breach of fiduciary responsibility was alleged.

Similarly, *Coleman* involved a challenge to the validity of the resolution adopted at the general convention of the national union installing the retiring president of the national as its new "Chief Executive", at the same salary he had received as president. Plaintiffs challenged the adoption of the resolution

asserting that it was, in effect, an amendment to the organization's constitution and that the procedure for amending the constitution had not been followed. Plaintiffs relied exclusively upon Section 501 in this Court, apparently upon the theory that use of the national union's funds to pay the salary of the Chief Executive was violative of Section 501. This Court, as it did in *Gurton*, held that under the facts alleged, no valid claim for relief was stated in the complaint.

It should also be noted that in *Head*, *Gurton* and *Coleman* the challenged acts of the defendant were either non-final, pertained to the national's use of its own funds, or did not result in the total annihilation of the local union involved, without the benefit of a hearing. In the instant case, the effectuation of the challenged directive of the defendant would result in the complete elimination of Local #72 as an autonomous entity, the irretrievable loss of its members' funds, and an unquestionable loss of its members' rights and privileges.

The significant distinctions between the claims asserted in this action and the claims asserted in the *Head* line of cases render *Head* wholly inapplicable to this case. In acute contrast to the facts of *Head*, plaintiffs in the instant case have asserted six (6) claims for relief, only one of which (the third) is grounded upon Section 501, and have presented evidentiary facts to substantiate each claim.

Perhaps most significantly, this Court has indicated, in decisions subsequent to *Gurton* and *Coleman*, and in fact situations similar to the case at bar, that the acts of a parent union resulting in the exercise of supervision and control over a local, under whatever guise that supervision is exercised, constitutes a violation of Section 101(a)(1) and of the trusteeship sections of the LMRDA. This Court has also indicated that a preliminary injunction is properly granted in such cases to prevent irreparable harm to the plaintiff. *Navarro v. Gannon*,

385 F.2d 512, 516 note 7 (2nd Cir. 1967). See also: *Schonfeld v. Raftery*, 381 F.2d 446 (2nd Cir. 1967).

Moreover, and with specific focus upon the loss of plaintiffs' property rights in the funds of the aggrieved local union, the facts in *Head* are significantly distinct from the facts of the case at bar. In *Head*, the act of the defendant of which plaintiff complained was provisional and non-final. Therefore, the funds of the local were specifically kept separate from the general treasury of the defendant, pending final approval of the proposed organizational changes. In this action, defendant has formulated no specific plan for the disposition of the General and Contingency Funds of plaintiff Local #72, and has taken no steps to prevent commingling of the funds of Local #72 with the defendant's general treasury. We emphasize that the transfer of funds from Local #72 to defendant is, if it is determined that defendant has in fact imposed a trusteeship over Local #72, an unlawful act under Section 303 (a) of the LMRDA (29 U.S.C. §463(a)). In the circumstances here present, contrary to the circumstances present in *Head*, a preliminary injunction is necessary to prevent the loss of plaintiffs' funds pending a trial on the merits of this action.

Plaintiffs have met their burden of showing that they are likely to prevail on the merits of this action.

B. A preliminary injunction is necessary to prevent irreparable injury of the gravest consequence to plaintiffs.

The record in the District Court establishes the irreparable injury and damage plaintiffs would sustain in the absence of a preliminary injunction: Local #72's existence would terminate, its funds would be dissipated, its members' voting rights would be diluted, its members would suffer improper discipline, and it would be subjected to an improper trusteeship.

Clearly, the District Court's finding that there was no "showing that the plaintiffs will suffer irreparable injury if this Court declines to grant a preliminary injunction" is erroneous and must be reversed.

In urging reversal, plaintiffs acknowledge the general rule that the grant or denial of a preliminary injunction rests in the sound discretion of the District Court and that the determination of the District Court will be reversed only if an improvident exercise of that discretion is shown. *Meccano Ltd. v. John Wanamaker*, 253 U.S. 136 (1920); *United States v. Corrick*, 298 U.S. 435 (1936); *Dino de Laurentiis Cinematografica, S.P.A. v. D-150 Inc.*, 366 F.2d 373 (2nd Cir. 1966).

Speaking for a unanimous Court, Judge Friendly has expressed the view of this Court in respect of the abuse of discretion standard in the following terms:

"... [the abuse of discretion standard] does not mean that denial of a temporary injunction is to be free from review. Congress would scarcely have gone to the pains of amending the Evarts Act, 26 Stat. 826, 828 (1891), which had provided interlocutory review over the grant or continuance of injunctions as an exception to the general requirement of finality, so as also to include their denial, 28 Stat. (1895) and then of repeating the process when it enacted §129 of the Judicial Code of 1911, 36 Stat. 1134, modifying 31 Stat. 660, (1900) in this respect, unless it had thought that meaningful duties were being imposed upon the Courts of Appeals. Moreover, as said by Chief Judge Margruder, "'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors," *In re Josephson*, 1

Cir., 1954, 218 F.2d 174, 182; see, to much the same effect, Judge Learned Hand in *Barnett v. Equitable Trust Co.*, 2 Cir., 1929, 34 F.2d 916, 920." *Carroll v. American Fed. of Musicians*, 295 F.2d 484, 488-89 (2nd Cir. 1961)

Applying the standard of review enunciated in *Carroll*, this Court has displayed its readiness to reverse the denial of an application for a preliminary injunction where, as here, the circumstances so dictate.

In *Concord Fabrics, Inc. v. Marcus Brothers Textile Corp.*, 409 F.2d 1315 (2nd Cir.1969), plaintiff in a copyright infringement action sought a preliminary injunction enjoining defendant's use of the disputed pattern. The District Court denied the motion, based upon its finding of fact that defendant's pattern was dissimilar to plaintiffs'. This Court, finding that the record failed to support the fact finding upon which the District Court based its refusal to grant the preliminary injunction, reversed.

Plaintiffs respectfully submit that, in the case at bar, the record fails to support the finding of fact upon which the District Court based its denial of plaintiffs' motion for a preliminary injunction, namely, that plaintiffs had failed to show that they would suffer irreparable injury in the absence of a preliminary injunction. In fact, plaintiffs' factual allegations of irreparable harm, upon which the District Court based both the temporary restraining order issued April 30, 1975, and the temporary injunction pending appeal issued June 20, 1975, are essentially uncontroverted in the record.

In *Carroll v. American Federation of Musicians*, *supra*, plaintiffs challenged, among other things, the "tax" and the "traveling surcharge" imposed by defendant local and international, respectively, upon earnings of plaintiffs. In reversing the denial of plaintiffs' application for a preliminary injunction against collection of these charges, this Court relied heavily

upon its finding that appellants' allegations of the unlawful character of the charges had been inadequately refuted by defendants.

Similarly, plaintiffs herein are alleging the illegality of an act of defendant United Brotherhood. By denying the cross-motion of the United Brotherhood to dismiss the complaint, the District Court found plaintiffs' allegations of illegality to be meritorious. The learning of *Carroll* seems to be that in the circumstances here present, including the fact that no answer has yet been interposed to the complaint, this Court will be inclined to find a preliminary injunction in favor of plaintiffs to be necessary and proper.

Lastly, in *Dino de Laurentiis, supra*, this Court reversed the denial of a motion for a preliminary injunction and indicated its proclivity to inquire anew into the moving party's showing of irreparable damage and likelihood of success on the merits:

"We do not here pass upon the ultimate questions which are for trial on the merits. We do, however, hold that movant's showing was a sufficiently clear showing of probable success and possible irreparable injury, with no consequent irreparable injury to [the party opposing the injunction] if the preliminary injunction is granted, to require the exercise of the court's discretion to preserve the status quo . . ." 366 F.2d at 375.

It should be noted that, even if the District Court's finding that plaintiffs would not suffer irreparable injury is regarded as a finding of fact pursuant to Rule 52(a), Federal Rules of Civil Procedure, this Court can reverse unhampered by the "clearly erroneous" standard of Rule 52(a) because the motion for a preliminary injunction was determined on documentary proof, without a hearing having been had. [SEE: Point II hereof, pages 22-24].

C. Issuance of a preliminary injunction will occasion no harm or prejudice to defendant.

At no point in the course of this action to date has defendant been able to show any element of harm that it will incur by the preservation of the *status quo* between the parties until the substantial issues herein involved are fully litigated and fairly determined.

Moreover, defendant can not be heard to urge time delay in effectuating its plans as occasioning harm, in view of the fact that it has, to date, failed even to interpose its answer in this action.

Plaintiffs have met their burden of establishing that they are entitled to the preliminary injunction requested in the District Court.

POINT II

The District Court's failure to set forth adequate findings of fact requires reversal.

Rule 52(a), Federal Rules of Civil Procedure, provides:

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or

memorandum of decision is filed it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

The District Court's order of June 18, 1975 [Appendix, pp. A118-119] does not contain the "brief, pertinent findings of contested matters" required for proper review by this Court. *Matton Oil Transfer Corp. v. The Dynamic*, 123F.2d 999, 1001 (2nd. Cir. 1941); *Pettersen Lighterage & Towing Corp. v. New York Central*, 126F.2d 992 (2nd Cir. 1942).

Ordinarily, the absence of adequate findings of fact requires a remand to the District Court with directions that proper findings of fact be made. 5A *Moore's Federal Practice* 2718 (§ 52.06[2]).

However, since no hearing was held in the District Court on plaintiffs' motion for a preliminary injunction, the District Court having determined the motion on the pleadings and affidavits before it, this Court can determine the factual issues giving rise to plaintiffs' claim of right to preliminary injunction. *Dropp v. Franklin National Bank*, 461F.2d 873, 879 (2nd Cir. 1972):

"This is not a case, however, where there was an evidentiary hearing below and the credibility of witnesses played an essential part in the district judge's determinations. We are in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and thus have broader discretion on review. See *Concord Fabrics, Inc. v. Marcus Brothers Textile Corp.*, 409 F.2d 1315, 1317 (2d Cir. 1969)."

In Accord: Orvis v. Higgins, 180 F.2d 537 (2nd Cir. 1950).

Accordingly, plaintiffs submit that this action should be remanded to the District Court with directions that the preliminary injunction requested by plaintiffs' issue.

CONCLUSION

The order of the District Court denying plaintiffs' motion for a preliminary injunction must be reversed. Plaintiffs' are entitled to the preliminary injunction requested. This action should be remanded to the District Court with directions that the preliminary injunction requested by plaintiffs' issue.

Dated: Rochester, New York
July 21, 1975

Respectfully submitted,

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Johnson D. Hay, Publisher
Russell D. Hay, Board Chairman

July 25, 1975

75-7394

Re: JOSEPH A. SAN FILIPPO, ET AL VS UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

State of New York)
County of Monroe) ss:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record
Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Goldstein, Goldman, Kessler and Underberg, Esqs.

Attorney(s) for

Plaintiffs-Appellants

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☒ Appendix
of the above entitled case addressed to:

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Sworn to before me this 25th day of July, 1975

[Signature]
Notary Public

Commissioner of Deeds